



**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

# Decision

**Matter of:** J&J Contractors, Inc.

**File:** B-421370

**Date:** March 30, 2023

---

Shane J. McCall, Esq., Nicole D. Pottroff, Esq., John L. Holtz, Esq., Stephanie L. Ellis, Esq., and Gregory P. Weber, Esq., Koprince Law, LLC, for the protester.  
Theresa A. Negron, Esq., and Robert D’Andrea, Esq., Department of the Army, for the agency.

Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

## DIGEST

1. Protest challenging the assignment of a deficiency and an overall rating of unacceptable to the protester’s proposal under the small business participation evaluation factor is denied where the protester did not provide required past performance information, and where the agency was not obligated to consider information submitted in connection with an earlier phase of the competition.
  2. Protest challenging the evaluation of the proposal of an offeror included in the competitive range is denied where the agency did not unreasonably fail to identify and consider what the protester contends is negative past performance information regarding that offeror.
- 

## DECISION

J&J Contractors, Inc., of North Billerica, Massachusetts, challenges the decision by the Department of the Army, U.S. Army Corps of Engineers, to eliminate its proposal from the competitive range established in connection with request for proposals (RFP) No. W912WJ22R0004, which was issued for design-build services at Hanscom Air Force Base in Massachusetts. J&J Contractors argues that the agency unreasonably evaluated its proposal under the solicitation’s small business participation factor and technical approach evaluation factor, and that the agency unreasonably failed to consider adverse past performance information concerning an offeror whose proposal was included in the competitive range.

We deny the protest.

## BACKGROUND

The Corps issued the solicitation on November 29, 2021, under the two-phase design-build procedures of Federal Acquisition Regulation (FAR) subpart 36.3 and the negotiated procurement procedures of FAR part 15. Agency Report (AR), Exh. 1, RFP at 1, 13.<sup>1</sup> The RFP sought proposals to design and construct the Nuclear Command Control and Communications (NC3) acquisitions management facility at Hanscom Air Force Base. Contracting Officer's Statement & Memorandum of Law (COS/MOL) at 1. The solicitation anticipates the award of a fixed-price contract that will require completion of the facility within 1,460 calendar days. RFP at 1, 20. The estimated value of the procurement is between \$25,000,000 and \$100,000,000. *Id.* at 1.

The solicitation stated that proposals would be evaluated in two phases. In phase 1 of the competition, proposals were to be evaluated based on two factors: (1) combined team experience and past performance, and (2) conceptual technical approach. *Id.* at 14. The RFP explained that offerors' phase 1 proposals "must receive minimum ratings of 'Acceptable' for both Factors 1 and 2 to move on to Phase 2 for further consideration." *Id.* The agency was to invite up to five offerors whose phase 1 proposals were found to be "the most highly qualified" to submit proposals for phase 2. *Id.*

In phase 2 of the competition, proposals were to be evaluated based on three factors: (1) detailed technical approach, (2) small business participation document, and (3) price. *Id.* Award will be made to the offeror that submits "the best overall proposal in Phase 2 that is determined to be the best value to the Government, with appropriate consideration given to the technical and price proposals." *Id.* The solicitation further advised that "[t]o receive consideration for award, a rating of no less than 'Acceptable' on the technical factors must be achieved." *Id.*

After submission and evaluation of J&J Contractors' phase 1 proposal, in June 2022, the Corps invited J&J Contractors to submit a phase 2 proposal. COS/MOL at 2. The protester submitted its phase 2 proposal by the October 14, 2022, due date. AR, Exh. 9, Competitive Range Determination at 2. The agency's source selection evaluation board (SSEB) assigned the protester's phase 2 proposal a rating of acceptable for the detailed technical approach factor, based on one strength and one weakness, and a rating of unacceptable for the small business participation document factor, based on two strengths, one deficiency, one weakness, and two uncertainties.<sup>2</sup>

---

<sup>1</sup> Citations to the record and the parties' briefings are to the Adobe portable document format (PDF) pages for those documents.

<sup>2</sup> For the detailed technical approach and small business participation document factors, the agency assigned proposals one of the following ratings: (1) outstanding, (2) good, (3) acceptable, (4) marginal, or (5) unacceptable. RFP at 15, 20.

AR, Exh. 8, SSEB Evaluation at 5, 9. As discussed below, the deficiency was based on the failure to provide information concerning the protester's past performance record of utilizing small businesses. *Id.* at 9.

Following the evaluation of phase 2 proposals, the agency established a competitive range for the purpose of conducting discussions. The agency's competitive range determination noted the adjectival ratings assigned to the protester's phase 2 proposal, including the assignment of the deficiency and overall unacceptable rating for the small business participation document factor. AR, Exh. 9, Competitive Range Determination at 8. The agency concluded that "J&J's proposal is not one of the most highly rated and will not be included in the competitive range." *Id.*

On December 13, the Corps notified J&J Contractors that its proposal had been excluded from the competitive range. AR, Exh. 10, Unsuccessful Offeror Notice at 1. The protester requested a debriefing, which concluded on December 28. AR, Exh. 14, Response to Debriefing Questions at 1. This protest followed.<sup>3</sup>

## DISCUSSION

J&J Contractors challenges the Corps's elimination of its proposal from the competitive range based on three primary arguments: (1) the agency unreasonably assigned its proposal a rating of unacceptable under the small business participation document factor; (2) the agency unreasonably failed to consider negative past performance of an offeror whose proposal was included in the competitive range; and (3) the agency unreasonably assigned the protester's proposal a weakness under the detailed technical approach factor.<sup>4</sup> For the reasons discussed below, we find no basis to sustain the protest with regard to the first and second arguments. Because we conclude that the agency reasonably found the protester's proposal unacceptable under the small business participation document factor, and excluded its proposal from the competitive range for this reason, we need not address the protester's third argument concerning the evaluation of its proposal under the detailed technical approach factor.

The evaluation of an offeror's proposal is a matter within the agency's discretion. *National Gov't Servs., Inc.*, B-401063.2 *et al.*, Jan. 30, 2012, 2012 CPD ¶ 59 at 5. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. *22nd Century Techs., Inc.*, B-413210, B-413210.2, Sept. 2, 2016, 2016 CPD ¶ 306 at 8. An offeror's disagreement with the agency's evaluation judgment,

---

<sup>3</sup> The agency states that it has not awarded a contract. COS/MOL at 7.

<sup>4</sup> J&J Contractors also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

without more, is insufficient to establish that the agency acted unreasonably. See *Vectrus Sys. Corp.*, B-412581.3 *et al.*, Dec. 21, 2016, 2017 CPD ¶ 10 at 3.

#### Small Business Participation Document Evaluation

J&J Contractors argues that the Corps improperly assigned its proposal a deficiency and a rating of unacceptable under the small business participation document factor, based on the protester's failure to provide past performance information required by the solicitation.<sup>5</sup> Protest at 8-10; Comments at 4-6. The protester also contends that the agency unreasonably failed to conduct clarifications to address the agency's concerns regarding the deficiency. Comments at 10. We find no basis to sustain the protest.

The solicitation advised that the agency would evaluate offerors' commitment to utilizing small businesses for the performance of the contract, including "[t]he extent to which the Offeror meets or exceeds" the small business participation goals set by the agency.<sup>6</sup> RFP at 19. Among other considerations, and as most relevant to this protest, the solicitation stated that the agency would evaluate the following:

The extent to which past performance in utilizing small businesses indicates a high likelihood of successfully meeting the small business goals proposed. This factor will consider the past performance of the offerors in complying with requirements of the clauses at FAR 52.219-8, Utilization of Small Business. . . .<sup>7</sup>

---

<sup>5</sup> J&J Contractors also argues that the agency unreasonably assigned its proposal a weakness and two uncertainties regarding the calculation of the proposal's total price and the percentages of small business participation. Protest at 11-14; Comments at 6-7. We need not address these arguments because, as discussed below, we conclude that the agency reasonably assigned a deficiency to J&J Contractors' proposal, and reasonably found that the deficiency merited a rating of unacceptable. See *Computerized Facility Integration LLC, a Newmark Co.*, *supra*.

<sup>6</sup> The RFP required offerors to explain how they would meet or exceed certain participation goals for different categories of small businesses that were expressed as a percentage of the total contract value. RFP at 10.

<sup>7</sup> Section 19.708(a) of the FAR requires agencies to insert the clause at issue here, 52.219-8, in solicitations and contracts where the contract amount is expected to exceed the simplified acquisition threshold (absent certain exceptions not present here). FAR clause 52.219-8 sets out the federal policy of providing small business concerns with the maximum practicable opportunity to participate in performing contracts, and ensure timely payment of small business subcontractors, and requires the contractor to agree to award subcontracts consistent with that federal policy. See *Bannum Inc.*, B-411586.2, Jan. 6, 2016, 2016 CPD ¶ 13 at 4-5. The solicitation also addressed FAR

*Id.* at 20.

The solicitation required offerors to submit a small business participation document (SBPD), and stated that offerors “shall articulate within their SBPD how they intend to meet the small business objectives and participation goals” by completing RFP attachment C. AR, Exh. 6, RFP amend. 9 at 10-11. As relevant here, RFP attachment C stated that “[t]he Government will review the extent of small business subcontracting compliance/ business relations--e.g. record of complying with requirements of FAR Clauses 52.219-8. . . .”<sup>8</sup> RFP at 75.

RFP attachment C required offerors to provide past performance information concerning their compliance with FAR clause 52.219-8 as follows:

All Offerors shall submit information substantiating their past performance in complying with FAR Clause 52.219-8, “Utilization of Small Business,” maximizing opportunities for U.S. small business subcontractors. The extent to which the offeror complied with FAR 52.219-8, Small Business Utilization may be evaluated based on one and/or a combination of the following:

- Reporting of small business performance in [the Contractor Performance Assessment Reporting System (CPARS)]
- Small business participation/utilization reporting []
- Documentation from customers local, state or federal agencies that demonstrates use/support of small businesses and/or provide information that substantiates the use of small businesses
- Documentation demonstrating total small business contract completion by the small business prime offeror and/or subcontracting to other small businesses
- Offerors with no prior contracts containing FAR Clause 52.219-8 must state so

---

clause 52.219-9, Small Business Subcontracting Plan, but that clause is not at issue in this protest.

<sup>8</sup> The other provisions of RFP attachment C required offerors to identify the size status of the prime offeror; the total combined dollar value and percentage of work to be performed; the total percentage and dollar value of participation to be performed by each type of subcategory small business; and the principle supplies/services to be provided by small businesses. RFP at 70-74.

*Id.* Attachment C also advised: “Offerors should ensure that all information required by the solicitation in support of the [small business participation document] evaluation factor is contained within this section.” *Id.*

J&J Contractors’ proposal addressed the requirement to submit information substantiating their past performance in complying with FAR clause 52.219-8 by placing an “X” in the box next to the language stating: “Offerors with no prior contracts containing FAR Clause 52.219-8 must state so.” AR, Exh. 17, Protester’s Phase 2 Proposal at 10. The protester’s proposal also stated the following:

J&J Contractors, Inc. had previously been a certified small business entity for many years and has, through its continued success and growth, surpassed the small business guidelines to become a large business entity. As a previous small business entity, J&J Contractors understands the importance of, and has always been a strong proponent of, utilizing small business entities whenever possible for procuring products and services. J&J Contractors has provided the below chart as evidence to support its’ previous and continued commitment to utilizing small business entities.

*Id.* Although the proposal stated that it “provided the below chart,” it did not include a chart or additional information substantiating its past performance in complying with FAR clause 52.219-8. *See id.*

The Corps assigned the protester’s proposal a deficiency because it “did not provide any past performance information relative to the utilization of Small Businesses,” which the agency stated “was a requirement of the solicitation as stated on Page 20 of the solicitation.” AR, Exh. 8, SSEB Evaluation at 9. The agency’s competitive range determination found that the protester’s proposal merited an unacceptable rating under the small business participation document factor based on the assignment of the deficiency identified by the SSEB:

J&J submitted the required Small Business Participation Document with sufficient detail to clearly identify their proposed participation of Small Businesses in the performance of the contract. The document included most of the elements required in the solicitation. However, J&J did not provide any past performance information relative to the utilization of Small Business. This information was a requirement of the solicitation; therefore, the lack of that information was considered a deficiency. As such, J&J received an “Unacceptable” rating for Factor 2.

AR, Exh. 9, Competitive Range Determination at 8.<sup>9</sup> Based on the rating of unacceptable, the agency found that the protester's proposal was "not one of the most highly rated and will not be included in the competitive range." *Id.*; see also COS/MOL at 9.

J&J Contractors argues the assignment of a deficiency and overall rating of unacceptable to its proposal for the small business participation document factor was unreasonable. The protester first contends that its proposal satisfied the requirement to substantiate its past performance in complying with FAR clause 52.219-8 because in completing RFP attachment C, the protester's proposal placed an "X" in the box beside the phrase, "Offerors with no prior contracts containing FAR Clause 52.219-8 must state so." AR, Exh. 17, Protester's Phase 2 Proposal at 10. The agency argues that merely marking this box did not satisfy the requirement to substantiate the protester's past performance, as a further statement was required. COS/MOL at 9-10.

We conclude the agency reasonably found that merely placing an "X" next to the box was not sufficient to address the solicitation requirement. In this regard, all of the options for substantiating an offeror's past performance in complying with FAR clause 52.219-8, including CPARS reports or references from customers, anticipated submission of additional information, rather than merely checking a box. See RFP at 75. Regarding the final option for offerors with "no prior contracts containing FAR Clause 52.219-8", the solicitation required an affirmative statement to that effect and J&J Contractors' proposal did not include any such statement.<sup>10</sup> Rather, as noted above, the protester's proposal signaled that it intended to provide additional information, stating, "J&J Contractors has provided the below chart as evidence to support its previous and continued commitment to utilizing small business entities." AR, Exh. 17, Protester's Phase 2 Proposal at 10. Despite this statement, the protester's proposal did not provide such a chart. On this record, we find no basis to sustain the protest.

Next, J&J Contractors argues that the RFP did not specify that an offeror's failure to submit the required past performance information in its phase 2 proposal would result in a rating of unacceptable. The protester contends that it provided the required past performance information in its phase 1 proposal in response to the team experience and past performance evaluation factor.

In this regard, J&J Contractors notes that its phase 1 proposal identified two past performance references that should have been considered in the evaluation of its phase 2 proposal: (1) a past performance questionnaire (PPQ) for a contract with the

---

<sup>9</sup> The competitive range determination did not address the weakness and uncertainties cited in the SSEB report and challenged by the protester. See Protest at 11-14; AR, Exh. 9, Competitive Range Determination at 8.

<sup>10</sup> We note that in its protest filings, the protester also does not affirmatively assert that it has no prior contracts containing FAR clause 52.219-8.

Corps at Hanscom Air Force Base, which included a rating of satisfactory for “Utilization of Small Business concerns,”; and (2) a CPARS entry for a contract with the Corps at Hanscom Air Force Base, which included a rating of satisfactory for “Utilization of Small Business.” Protest, exh. G, J&J Phase 1 Proposal at 166, 174. The protester contends that the agency unreasonably failed to consider this information from its phase 1 proposal in evaluating its phase 2 proposal. Protest at 8-9.

The Corps contends that it was not required to consider information from the protester’s phase 1 proposal because the instructions for submitting phase 2 proposals stated that “[o]fferors should ensure that all information required by the solicitation in support of the [small business participation document] evaluation factor is contained within this section.” RFP at 70. The protester acknowledges this solicitation provision, but argues that the RFP distinguished between the terms “shall” or “must” and the term “should,” in a manner that made the agency’s evaluation unreasonable. Protest at 9. In this regard, the solicitation distinguished between these terms as follows:

For submission requirements designated as “shall” or “must,” failure to provide the requested information will be considered a deficiency and the specified factor will be rated red/“Unacceptable,” and the Offer will be considered un-awardable unless revised. For submission requirements designated as “should,” failure to provide the requested information may result in a lower rating for the specified factor.

RFP at 14.

The protester argues, in essence, that the solicitation precluded the agency from assigning an unacceptable rating based on the failure to provide information that “should” have been provided, and that an unacceptable rating was allowed only if an offeror failed to provide information that “shall” or “must” be provided. Protest at 9. We disagree.

When a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Constructure-Trison JV, LLC*, B-416741.2, Nov. 21, 2018, 2018 CPD ¶ 397 at 3. We begin our review of a dispute concerning the meaning of a solicitation term by examining the plain language. *Bluehorse Corp.*, B-414809, Aug. 18, 2017, 2017 CPD ¶ 262 at 5.

The solicitation provision above did not expressly state, as the protester contends, that a rating of unacceptable may be assigned only for failing to meet a “shall/must” submission requirement. Rather, it explained that failure to meet a “should” submission requirement “may result in a lower rating for the specified factor.” RFP at 14. Moreover, the provision did not expressly state that an unacceptable rating was excluded from the “lower rating[s]” that could be assigned for failing to meet a “should”



submission requirement. Based on the plain language of the solicitation, we agree with the agency that the provision mandated an unacceptable rating where an offeror failed to meet a “shall/must” requirement, but granted the agency discretion in evaluating a failure to meet a “should” requirement. We therefore find no basis to conclude that the agency was precluded from assigning a rating of unacceptable to the protester’s proposal for failing to provide the required past performance information in its phase 2 proposal.

Next, J&J Contractors argues that even if the solicitation permitted the agency to assign its proposal a rating of unacceptable for failing to provide required past performance information in response to the phase 2 small business participation document factor, the agency knew that the protester had included relevant past performance information in its phase 1 proposal. The protester notes that the agency’s debriefing stated that “J&J has held numerous contracts with USACE [the Corps] New England District and other federal agencies, many of which were highlighted in its Phase 1 proposal for this procurement,” and further stated that “it was erroneous for J&J to indicate that it has no prior contracts containing [FAR clause 52.219-8].”<sup>11</sup> AR, Exh. 14, Response to Debriefing Questions at 2. The protester also notes that in response to questions from our Office inquiring as to why the agency did not consider in the phase 2 evaluation the information it apparently knew from the phase 1 proposal, the contracting officer stated that “I personally had knowledge of their contracts with [Army Corps] New England District and brought that knowledge into the debriefing responses to try to fully address the [debriefing] question.” Agency Response to GAO Questions, Mar. 3, 2023, at 3.

For these reasons, the protester argues that the agency was required to consider information that was available to it, notwithstanding the solicitation’s direction that “Offerors should ensure that all information required by the solicitation in support of the

---

<sup>11</sup> We note that J&J Contractors does not explain why, on the one hand, the protester’s phase 2 proposal indicated that the protester did not have prior contracts involving FAR clause 52.219-8, while on the other hand, the protester contends that the agency’s evaluation of its phase 2 proposal should have considered two past performance references from its phase 1 proposal and found that they demonstrated that the company had performed contracts with this clause. The two past performance references from the protester’s phase 1 proposal did not specifically state that the contracts involved FAR clause 52.219-8, but both references indicated ratings of satisfactory for utilization of small businesses, implying that the clause was incorporated in the contracts. See Protest, exh. G, J&J Phase 1 Proposal at 166, 174. Although the contracting officer states that she was aware that the protester had performed contracts involving FAR clause 52.219-8, she does not specifically state whether the two references cited by the protester here involved that clause. Agency Response to GAO Questions, Mar. 3, 2023, at 3. Because, as discussed herein, we do not conclude that the agency was required to consider information from the protester’s phase 1 proposal in the evaluation of its phase 2 proposal, we need not resolve these apparent factual inconsistencies.

[small business participation document] evaluation factor is contained within this section.” RFP at 70. Although the protester does not specifically cite decisions by our Office concerning an agency’s evaluation of past performance outside of an offeror’s proposal, we have explained that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider information not contained in an offeror’s proposal bearing on past performance because such information is “too close at hand” to require the offeror to shoulder the inequities that spring from an agency’s failure to obtain and consider the information. See, e.g., *International Bus. Sys., Inc.*, B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5; *Triad Int’l Maint. Corp.*, B-408374, Sept. 5, 2013, 2013 CPD ¶ 208 at 7.

We recognize that the small business participation document factor presents an unusual case of a non-past performance factor expressly providing for the evaluation of “information substantiating [an offeror’s] past performance in complying with FAR Clause 52.219-8.” RFP at 75. Even assuming that this evaluation factor provided for a past performance evaluation, we conclude for the reasons discussed below that the circumstances in *International Business Systems* and related decisions do not apply here because the protester’s proposal did not request that the agency consider the past performance information it now contends should have been evaluated.<sup>12</sup>

In *International Business Systems*, for example, although the protester’s proposal requested that the agency consider past performance for a contract that involved the same agency, the same services, and the same contracting officer, the agency did not do so because an agency official failed to complete a form required by the solicitation validating the past performance. *International Bus. Sys.*, *supra*, at 3-4. We sustained the protest because the agency’s failure to consider relevant information identified by the protester in its proposal and known to the agency was caused by the agency’s failure to complete an action that was within its own control, rather than a failure on the part of the protester. *Id.* at 5.

---

<sup>12</sup> Our decisions concerning the consideration of past performance information outside of an offeror’s proposal limit this principle to past performance evaluations, and do not apply the principle to non-past performance technical evaluation factors. See *Enterprise Solutions Realized, Inc.; Unissant, Inc.*, B-409642, B-409642.2, June 23, 2014, 2014 CPD ¶ 201 at 9. Here, the solicitation required offerors to submit and the agency to evaluate past performance information in connection with the phase 2 small business participation document factor, separate from the past performance factor in the phase 1 competition. The small business participation document factor, however, did not provide for the kind of evaluation normally associated with past performance; for example, the solicitation did not provide for the possibility of a neutral rating for a lack of relevant past performance. See FAR 15.305(a)(2). Nonetheless, even assuming the factor’s requirement to submit past performance information should be treated as a typical past performance factor evaluation, for the reasons discussed herein, the principle in our decisions regarding consideration of outside information does not apply to the protester’s arguments in this case.

In contrast, the principle addressed in *International Business Systems* and related decisions is not intended to remedy an offeror's failure to include information in its proposal. See *Great Lakes Towing Co. dba Great Lakes Shipyard*, B-408210, June 26, 2013, 2013 CPD ¶ 151 at 8; *FN Mfg. LLC*, B-407936 *et al.*, Apr. 19, 2013, 2013 CPD ¶ 105 at 4. Where an offeror is in control of the past performance information contained in its proposal--and not reliant on third parties to submit that information--it exercises its own judgment as to the information that the agency should consider. See *L-3 Servs., Inc.*, B-406292, Apr. 2, 2012, 2012 CPD ¶ 170 at 12 n.10.

Here, we find that this protest does not present circumstances where the agency unreasonably failed to consider past performance information that the protester requested it evaluate. As discussed above, the protester's proposal stated that it was providing a chart to demonstrate the offeror's "previous and continued commitment to utilizing small business entities." *Id.* As also discussed above, however, the proposal did not include the chart or any such information. *Id.* On this record, we conclude that the agency was not obligated to consider past performance information outside the protester's phase 2 proposal for the small business participation document factor because the protester's proposal did not request that the agency do so.

Finally, J&J Contractors argues that the agency was required to conduct clarifications to allow the protester to remedy its failure to submit the required past performance information. Comments at 10. The provisions at FAR section 15.306 describe a spectrum of exchanges that may take place between a contracting agency and an offeror during a negotiated procurement. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated; an agency may, but is not required to, engage in clarifications that give offerors an opportunity to explain certain aspects of proposals or to resolve minor or clerical errors. FAR 15.306(a); *Satellite Servs., Inc.*, B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2. Clarifications, however, cannot be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of a proposal, or otherwise revise a proposal. *A.G. Cullen Constr., Inc.*, B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5-6. In contrast, discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. *ADNET Sys., Inc. et al.*, B-408685.3 *et al.*, June 9, 2014, 2014 CPD ¶ 173 at 16.

Here, we conclude that the agency reasonably found that the protester's proposal did not include the required past performance information concerning compliance with FAR clause 52.219-8, and that the agency was not required to consider information outside the protester's phase 2 proposal. Further, the record shows that the protester's proposal indicated that the protester intended to include a chart addressing this information, and was not relying on past performance information the protester now contends should have been considered. See AR, Exh. 17, Protester's Phase 2 Proposal at 10. Under these circumstances, we agree with the agency that allowing the protester to direct the agency to relevant past performance information outside of its

phase 2 proposal would have constituted a material revision to the proposal and would have required discussions, rather than clarifications. See *A.G. Cullen Constr., Inc., supra*; *ADNET Sys., Inc., et al., supra*. In any event, agencies have broad discretion as to whether to seek clarifications from offerors, and offerors have no right to clarifications regarding proposals. *MicroTechnologies, LLC*, B-418700, July 31, 2020, 2020 CPD ¶ 260 at 5.

In sum, we conclude that the Corps reasonably assigned a deficiency and overall rating of unacceptable to J&J Contractors' proposal under the small business participation document factor, and reasonably excluded its proposal from the competitive range. We therefore find no basis to sustain the protest.

#### Evaluation of Other Proposal in the Competitive Range

J&J Contractors argues that the agency unreasonably failed to consider adverse past performance in evaluating the proposal of [DELETED], another offeror whose proposal was included in the competitive range. We find no merit to this argument.

As discussed above, our Office has explained that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider information not contained in an offeror's proposal bearing on its past performance. While the decisions discussed above concern instances where we have found that an agency unreasonably failed to consider information relating to the protester's past performance, we have also found that, in certain circumstances, an agency may not reasonably ignore negative past performance information concerning the awardee's proposal. See *Northeast Military Sales, Inc.*, B-404153, Jan. 13, 2011, 2011 CPD ¶ 2 at 6-7. In these decisions, however, we have limited this principle to past performance regarding the awardee's performance of a contract involving the same agency, the same services, and the same contracting officer, or where the agency evaluators were specifically aware of the information. See *id.*; *General Dynamics Info. Tech., Inc.*, B-420589, B-420589.2, June 15, 2022, 2022 CPD ¶ 149 at 26-27.

The record provided by the agency shows that [DELETED]'s proposal was included in the competitive range. AR, Exh. 9, Competitive Range Determination at 9-10; COS/MOL at 6. J&J Contractors contends that [DELETED] was "accused of violating small business participation requirements" in a contract with the [DELETED]. Protest at 10. The protester contends that the agency unreasonably failed to consider this information in evaluating [DELETED]'s proposal under the small business participation document factor. We find no basis to conclude that the agency was required to identify and consider this information because the contract cited by the protester did not concern the Corps, and the protester does not establish that the agency evaluators

were aware of the allegations.<sup>13</sup> See *General Dynamics Info. Tech., Inc., supra*. We therefore find no basis to sustain the protest.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

---

<sup>13</sup> The protester also contends that the agency should have considered a fine paid by [DELETED] in [DELETED] to settle an alleged False Claims Act violation in connection with a contract awarded by the U.S. Coast Guard. Comments at 12 n.3 (citing a [DELETED] Department of Justice press release regarding the fine). This argument, however, is untimely because the protester does not explain why this argument was not raised in its initial protest. See 4 C.F.R. § 21.2(a)(2) (protests of other than the terms of solicitations must be filed within 10 days after the basis is known or should have been known); *Lanmark Tech., Inc.*, B-410214.3, Mar. 20, 2015, 2015 CPD ¶ 139 at 5 n.2 (protest grounds that could have been raised in the initial protest, but were raised for the first time in comments, are untimely).